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February 23, 1998

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W. , Rm. 222
Washington, D.C. 20554

Re: Bell Atlantic's Application for Review, 1993-96 Annual Access Tariff Filings, CC Dockets 93-193, Phase I, Part 2, 94-65 (filed July 25, 1997)

Dear Ms. Roman Salas:

The attached letter is being delivered today to Chairman William Kennard and Commissioners Susan Ness, Harold Furchtgott-Roth, Michael Powell, and Gloria Tristani regarding the above captioned proceeding. Copies are also being provided to Ruth Milkman, James Schlichting, and Judith Nitsche of the Common Carrier Bureau.

Please enter this letter and the attached material into the record as appropriate.

Should you have any questions please do not hesitate to contact me.

Sincerely,

Attachment

cc: Hon. William Kennard
Hon. Susan Ness
Hon. Harold Furchtgott-Roth
Hon. Michael Powell
Hon. Gloria Tristani
Ms. R. Milkman
Mr. J. Schlichting
Ms. J. Nitsche

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February 23, 1998

The Honorable William Kennard
The Honorable Susan Ness
The Honorable Harold Furchtgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristani
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C., 20554

Re: Bell Atlantic's Application for Review, 1993-96 Annual Access Tariff Filings, CC Dockets 93-193, Phase I, Part 2, 94-65 (filed July 25, 1997)

Dear Chairman and Commissioners:

The purpose of this letter is to summarize the reasons that the Commission should grant the captioned application for review, currently pending before you. I am writing to you directly because this proceeding involves an appeal from a previous order by the staff, and will be decided directly by the Commission.

The issue presented by the application grows out of an investigation of Bell Atlantic's 1993-96 annual access tariffs. During the years these tariffs were in effect, the Commission's price cap rules required Bell Atlantic to "share" with its customers one-half of any earnings above a certain threshold by reducing the caps on its prices during the succeeding year. In an order concluding its investigation of these tariffs, the Commission concluded that Bell Atlantic had incorrectly allocated the amount of its sharing obligation among the various baskets of services. The net effect was that some baskets received too much of a reduction, while others had not received enough. The total amount that Bell Atlantic had shared with its customers, however, was never in dispute and all the parties agreed that Bell Atlantic had shared the correct amount. As a result, the Commission directed Bell Atlantic to file new tariffs to "correct how they allocate their sharing obligation among baskets."

In response, Bell Atlantic filed a new tariff that did precisely as the Commission directed. This tariff corrected the level of the caps on its prices in each of the various baskets by increasing some and lowering others in order to allocate its sharing obligation in the manner prescribed by the Commission.

The Common Carrier Bureau rejected the corrected tariff, however, and ordered Bell Atlantic to refund approximately $34 million to long distance carriers. Rather than correct the allocation of sharing among baskets as directed by the Commission, the Bureau concluded that Bell Atlantic should be required instead to reduce prices in baskets that had been allocated too little of the sharing obligation but should be barred from making corresponding increases in baskets that had been allocated too much. It is this Bureau order that should be reversed on review by the Commission.

As an initial matter, the Bureau's order is flatly inconsistent with both the Commission's order concluding the tariff investigation and with its price cap rules. It is inconsistent with the tariff order because the Commission expressly directed Bell Atlantic to "correct" the manner in which it allocated its sharing obligation "among" baskets – a requirement that simply was not followed in the Bureau's one-sided order. And it is inconsistent with the price cap rules because those rules limit Bell Atlantic's sharing obligation to 50 percent of any earnings above the sharing threshold. Although no one disputes that Bell Atlantic already fully discharged its sharing obligations, the Bureau's order now requires Bell Atlantic to share an additional $34 million over and above the amount required by the rules.

Ironically, the Bureau's order does not dispute the fact that Bell Atlantic already shared the correct amount, and expressly recognizes that "a corrected sharing allocation for all baskets would mean that some basket indices should rise if others fall." Instead, it asserts that the "equities and a balancing of interests" justifies a refund.

In reality, the Bureau's order merely provides an unwarranted windfall to long distance carriers, which are customers of both the services that were reduced by too much originally, and of the services that are receiving an extra reduction today. The refund is particularly unwarranted, moreover, at a time when long distance carriers are imposing dramatic rate increases on their own customers in response to the recent universal service and access reform orders – to the tune of some $2.3 billion in price increases in response to increased costs of only $265 million – and blaming those increases on the Commission.

Requiring a refund here is inequitable for an additional reason. During the period of time that the tariff investigation was pending, section 204(a) of the Act required the Commission to complete its investigation within 12 months (or 15 months for matters of "extraordinary complexity"). Had the Commission met its statutory deadline, rather than allow the investigation to remain pending for up to 5 years in the case of the 1993 tariff, the amount of the current refund would have been approximately one tenth of the amount ordered by the Bureau after years of delay.

As a purely legal matter, moreover, the fact that the Commission failed to meet its statutory deadline under section 204(a) of the Act deprives it of authority to order a refund in any event. As the D.C. Circuit has explained, the FCC's section 204 refund authority is a narrow exception to the "'cardinal principle of ratemaking'" that an agency has "'no power to alter a rate retroactively'" except as specifically authorized by Congress. *Illinois Bell Telephone Co. v.*

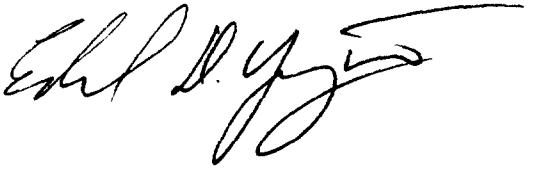
FCC, 966 F. 2d 1478, 1482 (D.C. Cir. 1992), *quoting Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). For that reason, just as the express terms of section 204(a) "convey the power to order refunds," those same terms "likewise set forth the conditions of that conveyance." ***Id.***, at 1481. As a result, the FCC is able to order refunds ***only*** to the extent expressly authorized by the terms of section 204(a). By its express terms, however, that provision as it was in effect during the relevant period authorized the FCC to grant refunds ***only*** if it acts within at most 15 months, and the Commission cannot unilaterally expand the authority granted to it by Congress.

This simple fact also makes this case fundamentally different from the line of cases that suggest that an agency's failure to comply with a statutory time limit ordinarily does not divest it of authority to act unless the statute specifies the consequences of such failure. Those cases deal with instances in which an agency not only is otherwise permitted to take the underlying action, but is required to do so. Under those circumstances, it is perfectly reasonable to assume that Congress did not intend to divest an agency of responsibility to do something it is required to do whenever it fails to act in a timely manner.

Here, in contrast, the Commission is affirmatively prohibited from ordering refunds by the rule against retroactive ratemaking, *except* to the extent expressly authorized by Congress in section 204(a). But section 204 authorizes the Commission to order refunds only within a 15 month window, and outside that period the normal prohibition against retroactive ratemaking applies. Moreover, the Communications Act does, in fact, specify the consequences if FCC failure to act within the statutory period. As the D.C. Circuit has held, if the Commission fails to act within the bounds of its limited refund authority, it is limited to prospective ratemaking under section 205. *See Illinois Bell,* 966 F.2d at 1481.

Because the Bureau order at issue here was erroneous both as a matter of law and of sound public policy, I respectfully urge the Commission to promptly grant Bell Atlantic's pending application for review.

Sincerely,



cc: Ms. R. Milkman
Mr. J. Schlichting
Ms. J. Nitsche